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No. 81-2278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNION ELECTRIC COMPANY,

Petitioner,

v.

CITY OF KIRKWOOD, MISSOURI, A MUNICIPAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Was it error for the United States Court of Appeals for the Eighth Circuit to decide that Union Electric Company's price squeeze conduct was not immunized from the antitrust laws by the First Amendment under the *Noerr-Pennington* doctrine, simply because the company's rate requests, which were silent as to price squeeze, were filed with federal and state regulatory agencies?

2. Did the United States Court of Appeals for the Eighth Circuit err in deciding that Union Electric Company's price squeeze conduct was not impliedly immunized from the antitrust laws by wholesale rate regulation under the Federal Power Act or exempted from the antitrust laws by Missouri's retail rate regulation, when neither the federal nor state commission compelled or authorized price squeeze conduct pursuant to a clear policy inconsistent with the antitrust laws?

3. Did the United States Court of Appeals for the Eighth Circuit err in deciding that electricity was a "commodity" for the purpose of applying the Robinson-Patman Act?

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BRIEF OF RESPONDENT IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The City of Kirkwood, Missouri (Kirkwood or City), plaintiff and respondent, owns and operates its electrical distribution system and sells electricity at retail to customers located in approximately two-thirds of the City's area. Kirkwood owns no generation facilities, but purchases all of its electricity at wholesale from Union Electric Company (Union or UE). Union, defendant and petitioner, is an investor-owned company, the largest electric utility in Missouri, and one of the largest electric utilities in the United States. It is vertically integrated into the generation, transmission, and distribution levels and controls the distribution and sale of retail electric power in southern Iowa, western Illinois and eastern Missouri in-

cluding the entire area surrounding Kirkwood and one-third of the area within the City.

Union's rates are regulated at the federal and state levels. Union's wholesale rates are regulated by the Federal Energy Regulatory Commission (FERC)[1] pursuant to the Federal Power Act, 16 U.S.C. §§ 824 *et. seq.* (1976). When a supplier desires an increase in wholesale rates, it must file a proposed rate increase before the FERC. After the sixty-day notice period has expired, the FERC can suspend collection of the rate from one day to a maximum of five months, but, at the end of the suspension period, the utility collects its proposed increase on an interim basis, subject to refund, until the FERC renders its final judgment establishing the just and reasonable rate. Union's retail rates are regulated by the Missouri Public Service Commission (MPSC) pursuant to Mo. Ann. Stat. ch. 393 (Vernon 1975). A proposed increase in retail rates cannot go into effect until after a final MPSC order establishing just and reasonable rates, but the MPSC must act no later than eleven months after the rate request has been filed.

Kirkwood's complaint, filed September 1, 1977 and amended on November 23, 1977, alleges that Union unilaterally filed a request for an increase in wholesale rates before the FERC and began collecting the 33.72 percent rate increase from Kirkwood as of September 13, 1975. Union filed no corresponding retail rate request before the MPSC. As a result, Kirkwood's wholesale rate

[1]As of October 1, 1977, most of the functions of the Federal Power Commission were transferred to the FERC. Department of Energy Organization Act, Pub. L. No. 95-91, § 402(a), 91 Stat. 565 (1977) (codified at 42 U.S.C. § 7172(a) (1976). For convenience, both federal commissions will be referred to as the FERC.

was approximately 35 percent higher than Union's comparable[2] retail rate collected from its large industrial primary service customers. The rate disparity was moderated somewhat but not eliminated by a subsequent retail rate increase and a lower wholesale rate resulting from a settlement.[3] On September 27, 1977, Union again filed for a wholesale rate increase of 39.75 percent with no corresponding retail rate increase. Kirkwood claims that by this "price squeeze"[4] conduct, Union has intentionally monopolized and attempted to monopolize interstate trade and commerce in the sale and distribution of electric power at retail in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2 (1976), and has substantially lessened competition in violation of Section 2(a) of the Clayton Act, 15 U.S.C. § 13(a) (1976), as amended by the Robinson-Patman Act.

On January 13, 1978, by an interlocutory order, the district court dismissed Kirkwood's Robinson-Patman Act claims on grounds electricity is not a "commodity" for the purpose of the Act and the complaint did not sufficiently allege sales occurring in interstate commerce. On July 24, 1980, Kirkwood sought reconsideration of the order and

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[2]But for its identity as a retail-level competitor, Kirkwood would have qualified for this retail rate.

[3]The settlement explicitly preserved the issue of price squeeze for subsequent litigation.

[4]A price squeeze occurs when a vertically integrated company which has monopoly power at the wholesale level but faces competition at the retail level sets its wholesale rates so high that its wholesale customers will be unable to compete with it in the retail market. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 436-48 (2d Cir. 1945); *see generally,* Note, *The Applicability of Antitrust Laws to Price Squeezes in the Electric Utility Industry,* 54 St. John's L. Rev. 103, 104 (1979).

never ruled on the motions. Instead, on December 31, 1981, the district court disposed of the case by granting summary judgment for Union on grounds of three antitrust immunities: (1) federal implied immunity, (2) state action exemption, and (3) the *Noerr-Pennington* doctrine. The United States Court of Appeals for the Eighth Circuit reversed on both the Sherman Act and Robinson-Patman Act claims. The court remanded the case to permit Kirkwood to amend its complaint as to sales and to add other antitrust violations turned up in discovery. However, the court stayed its remand pending the outcome of Union's petition for certiorari. Kirkwood Appendix, A. [hereinafter cited as Kwd App.]

SUMMARY OF ARGUMENT

The court below fully considered and properly rejected Union's claims to a broad antitrust immunity. The decision is not contrary to the precedents of this Court, nor is there any significant conflict in the circuits. A previous case has considered the three specific antitrust immunities raised in Union's petition. In *City of Mishawaka v. Indiana & Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977) (*Mishawaka I*), *cert. denied,* 430 U.S. 922 (1978) and *City of Mishawaka v. American Electric Power Co.*, 616 F.2d 976 (7th Cir. 1980) (*Mishawaka II*), *cert. denied,* 449 U.S. 1096 (1981), the United States Court of Appeals for the Seventh Circuit rejected antitrust immunity for an electric utility's price squeeze conduct. This Court properly denied review then and should do so now.

The court below fully considered and properly decided Union's price squeeze conduct was not immunized from the antitrust laws by the First Amendment under the *Noerr-Pennington* doctrine just because Union filed rate

requests before state and federal commissions. Contrary to Union's inaccurate construction of the decision below, the court correctly found Union had not satisfied the threshold requirement for the immunity: is the challenged conduct a genuine petitioning of the government for a redress of grievances? Union, in the present case, actually put the restrictive rates into effect against the City, placing it in a price squeeze. Union's rate requests are not speech advocating government approval of price squeeze conduct. There is no conflict in the circuits on this point.

The court below also properly rejected Union's claims to antitrust immunity for price squeeze conduct just because Union's wholesale and retail rates are regulated. Union's manipulation of the timing and level of its wholesale and retail rate filings was neither compelled nor authorized by the FERC or the MPSC. Furthermore, there is no "affirmatively expressed and clearly articulated" policy at either commission inconsistent with the antitrust laws. Indeed, their respective policies are complementary to the antitrust laws on this issue. Again, there is no conflict in the circuits.

Finally, Union offers no persuasive reason for altering this Court's policy of denying review to federal court construction of the word "commodities" for the Robinson-Patman Act, either in general or as applied to electricity. The alleged conflict in the circuits is overstated. The weight and trend of better-reasoned authority holds electricity to be a commodity.

I. CORRECTLY CONSTRUED, THE DECISION OF THE COURT BELOW PROPERLY REJECTED THE APPLICABILITY OF THE NOERR-PENNINGTON ANTITRUST IMMUNITY.

Union patently misconstrues the lower court's rationale for rejecting Union's claim to an antitrust immunity under the *Noerr-Pennington* doctrine[5] and seriously misstates this Court's holdings on the issue.[6] When the lower court's actual rationale is compared to this Court's actual holdings, it is plain the lower court fully considered and properly decided Union's price squeeze conduct was not immunized from the antitrust laws by the First Amendment merely because Union filed rate requests before state and federal commissions.

Union accused the court below of improperly applying *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) to conclude "that if the purpose or

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[5]Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (Noerr); United Mine Workers v. Pennington, 381 U.S. 657 (1965) (Pennington).

[6]Union also misstates the nature of plaintiff Kirkwood's antitrust claims. Though the complaint, as amended, may not *yet* allege any anticompetitive conduct other than the "price-squeeze," the court below remanded the case to the district court with instructions to permit Kirkwood to amend its complaint to add claims as to other violations including price discrimination, territorial restrictions, a refusal to wheel and a refusal to deal. City of Kirkwood v. Union Electric Co., 671 F.2d 1173, 1176 n. 6 (8th Cir. 1982), Union Appendix, A-5 [hereinafter cited as Union App.]. Because that order has been stayed pending the outcome of Union's petition for certiorari, Kirkwood is unable to amend its complaint at this time. Furthermore, it is not true that Union's filings were made in good faith. While Kirkwood does not attack Union's retail and wholesale rate filings per se, Kirkwood does challenge Union's manipulation of the timing and level of the rates so as to create a price squeeze. This manipulation is not an act of "good faith."

end-result of the petition for governmental action is anti-competitive, the First Amendment protection from antitrust damages is lost." Union Petition at 5. The court made no such finding. Instead, the court found that Union had not satisfied the threshold requirement for a claim to a *Noerr-Pennington* antitrust immunity; is the challenged conduct a genuine petitioning of the government for a redress of grievances?

In *Cantor,* the mere filing of a tariff which included a free light bulb distribution program was found not to be a petitioning of the government for approval of the tie-in conduct such that an antitrust immunity was necessary. As the lower court pointed out, the Supreme Court held that:

> [N]othing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct.

428 U.S. at 601-2.[7] Similarly, the lower court found Union's rate requests not to be speech advocating govern-

[7]Union attempts to limit the force of this Court's holding by arguing the quoted passage came from a plurality opinion and was not the basis of the decision. However, the rationale of the point, that mere tariff approval by the state does not confer an antitrust immunity, was adopted in part III of the case which was joined by five members of the Court. Moreover, decisions on state action exemption are not unrelated to the *Noerr-Pennington* exemption. The state action exemption and the *Noerr-Pennington* exemption overlap but are not coincident. *See,* P. Areeda, *Antitrust Law* ¶ 212.6 (1982 Supp.). But in the context of a general regulatory antitrust exemption, as advocated by Union, the concepts may be the same. Certainly the dissent in *Cantor* thought so. 428 U.S. at 622-28. *See also,* Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine,* 45 U. Chi. L. Rev. 80, 88-94 (1977) (Analysis of the impact of *Cantor* on *Noerr-Pennington* doctrine).

ment approval of price squeeze conduct. Union was free to ask either the federal or state commission for authorization for a price squeeze, but its rate filing does not constitute such a request, but was an actual restriction which had an immediate anticompetitive impact upon the City.

In *Trucking Unlimited,* the baseless litigation carried out against competing motor carriers so as to deny their entry into the market could not be considered a genuine petitioning for grievances. Similarly, Union's manipulation of the timing and level of its retail and wholesale rate requests seeks to *avoid* regulatory oversight of its price squeeze behavior instead of petitioning for governmental *approval* of the conduct. As the lower court said, "[i]t is not for expression of opinion that Kirkwood seeks to compel UE to respond in damages, but rather for UE's [price squeeze] conduct in the market place." Union App. at A-14-15.

There is no conflict in the circuits on this point. Union's citations at pages 8 and 9 of its petition do not address the issue of rate filings as speech advocating anticompetitive conduct. In *City of Mishawaka v. American Electric Power Co.,* 616 F.2d 976, 981-83 (7th Cir. 1980) (*Mishawaka II*), *cert. denied,* 449 U.S. 1096 (1981), the court held rate requests which had an anticompetitive effect were insufficient to immunize an electric utility's price squeeze conduct from the antitrust laws, and this Court properly denied certiorari.

Union seriously misstates the *Noerr-Pennington* doctrine when it argues that, because Kirkwood did not allege sham litigation in its complaint, Union is exempt from the antitrust laws. Union Petition at 6. Union's argument stands the concept of an affirmative defense on its head. It is Union that must demonstrate that Congress did not intend the antitrust laws to apply to its price squeeze conduct. Sham litigation is only one of several kinds of conduct to which the *Noerr-Pennington* immunity does not

apply. Because Union's rate requests of themselves are not anticompetitive conduct[8] and because Union's rate requests did not ask any regulatory authority to approve a price squeeze, it is Union who cannot establish the applicability of the *Noerr-Pennington* antitrust immunity.

The court below fully considered and correctly decided that the *Noerr-Pennington* immunity did not apply. Moreover, this case is identical to another case deciding the issue wherein this Court declined to review a finding that an electric utility's price squeeze conduct was not exempted by the First Amendment from the operation of the antitrust laws. *Mishawaka II.*

II. UNION ELECTRIC'S PRICE SQUEEZE CONDUCT IS NOT EXEMPT FROM THE ANTITRUST LAWS MERELY BECAUSE OF RATE REGULATION.

Union's only argument in behalf of certiorari on the issue of federal implied immunity and state action exemption is an alleged conflict between the decision of the court below and prior decisions of this Court. There is no such conflict. The court below fully considered Union's arguments and correctly decided that federal and state regulation does not immunize Union's price squeeze conduct from the antitrust laws.

A. The Federal Power Act Does Not Exempt An Electric Utility's Price Squeeze From The Antitrust Laws.

The Federal Power Act does not expressly immunize any conduct of electric utilities from the antitrust laws nor can a blanket immunity from antitrust laws be implied

[8] It is Union's manipulation of the *interaction* of the wholesale and retail rates that create the price squeeze.

from the statute's legislative history. *Otter Tail Power Co. v. United States,* 410 U.S. 366, 373-4 (1973) ("There is nothing in the legislative history which reveals a purpose to insulate electric power companies from the antitrust laws"). Union claims to seek only a specific implied immunity for its challenged price squeeze conduct, but cites in support a case finding a blanket immunity implied from the Securities and Exchange Act for certain stock trading regulations of the New York Stock Exchange. Union further argues for immunity on the basis of the discredited "filed rate doctrine" without referring to it by name.[9] Both arguments are off point.

Because Union was neither compelled nor coerced by the FERC into creating a wholesale retail rate differential that created a price squeeze, and because there is no conflict between the Federal Power Act and the antitrust laws in their goals to curb such anticompetitive conduct, a specific implied immunity is unwarranted. Moreover, in a previous case where the issue of a specific implied immunity for an electric utility's price squeeze was laid before the Court, after request and receipt of the views of the Solicitor General on implied immunity, this Court declined to review a finding of no such immunity. *City of Mishawaka v. Indiana & Michigan Electric Co.,* 560 F.2d 1314 (7th Cir. 1977) (*Mishawaka I*), *cert. denied,* 430 U.S. 922 (1978).

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[9]The "filed rate doctrine" as a form of back door antitrust immunity was rejected by the court below and was recently rejected by the United States Court of Appeals for the Second Circuit. *City of Groton v. Conn. Light & Power Co.,* 662 F.2d 921, 929 (2d Cir. 1981).

As this Court has recognized, one factor in determining whether the presumption against implied immunity has been overcome is whether the challenged conduct was within the defendant's control or coerced by the regulatory agency. *Otter Tail,* 410 U.S. at 374 (Interconnection and wheeling "relationships are governed in the first instance by business judgment and not regulatory coercion"); *see, Cantor v. Detroit Edison Co.,* 428 U.S. 579, 593-4 (1976); *see also,* Note, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine,* 57 Tex. L. Rev. 751, 787-8 (1979). Contrary to Union's assertions, the FERC neither ordered nor authorized Union's price squeeze. under Section 205(c) of the Federal Power Act, 16 U.S.C. § 824d (1976) and under Mo. Rev. Stat. § 3.93 150(1) (1978), Union alone controls both the timing and the level of its proposed wholesale and retail rates respectively. Union was always free to file wholesale rates before the FERC that would avoid the rate disparity. Thus, no antitrust immunity can be implied on this basis. *Mishawaka I,* 560 F.2d at 1220-21; *City of Groton v. Connecticut Light & Power Co.,* 456 F.Supp. 360, 367 (D. Conn. 1978) (*Groton I*); *City of Shakopee v. Northern States Power Co.,* Civ. No. 4-75-591, slip op. at 6 (D. Minn. October 10, 1976) (Kwd. App. B).

The other factor to be considered is whether the goals of the Federal Power Act and the antitrust laws are so clearly repugnant as to price squeeze that antitrust liability would interfere with the FERC's pursuit of that inconsistent goal. *National Gerimedical Hospital & Gerontology Center v. Blue Cross of Kansas City,* 452 U.S. 378 (1981); *United States v. National Association of Security Dealers,* 422 U.S. 694, 719-20 (1975) (*NASD*) ("Implied antitrust immunity is not favored and can be justified only by a convincing showing of clear repugnancy between the an-

titrust laws and the regulatory system"); *Silver v. New York Stock Exchange,* 373 U.S. 341, 357 (1963) ("Repeal is to be regarded as implied only if necessary to make the [regulatory act] work, and even then only to the minimum extent necessary"). In *FPC v. Conway Corp.,* 426 U.S. 271 (1976), this Court held that the FERC has jurisdiction to consider and must consider price squeeze claims. Thus, the goals of antitrust law and the FERC regarding a price squeeze are not inconsistent. Contrary to Union's misreading of *Gordon v. New York Stock Exchange,* 422 U.S. 659 (1975), mere agency authority to consider antitrust matters does not prove the agency has a goal inconsistent with the antitrust laws. *Gulf States Utilities Co. v. FPC,* 411 U.S. 747, 759 (1953) (Commission consideration of antitrust issues is an important "first line of defense against those competitive practices that might later be the subject of antitrust proceedings"); *see, United States v. Radio Corporation of America,* 358 U.S. 354 (1959).

In fact, FERC regulation is complementary to the antitrust laws, for, although the pro-competitive goals are the same, the remedies differ. *Mishawaka I,* 560 F.2d at 1318-9; *Borough of Ellwood City v. Pennsylvania Power Co.,* 462 F. Supp. 1343, 1343, 1349-50 (W.D. Pa. 1979); *see generally, Northern Natural Gas Co. v. FPC,* 399 F.2d 953, 959-61 (D.C. Cir. 1968). The FERC sees no conflict between antitrust enforcement of price squeeze claims and its own regulation of the issue. Price Squeeze – Substantive Rules, 44 Fed. Reg. 67,158, 67,160 (1979) (proposed rulemaking) ("The Commission does not have authority to grant damages to compensate wholesale customers for loss of business or other anticompetitive effects due to price discrimination; this relief must be sought in the courts") (footnote omitted). Moreover, the FERC has specifically disavowed a claim to exclusive jurisdiction

over price squeeze issues.[10] Brief for the United States and the Federal Energy Regulatory Commission as *Amici Curiae, American Electric Power Co., Inc. v. City of Mishawaka,* No. 2059 (U.S. December, 1980) at 10 (*Mishawaka II*); Brief for the United States as *Amicus Curiae, Indiana & Michigan Electric Co. v. City of Mishawaka,* No. 77-689 (U.S. April, 1978) at 10-11 (*Mishawaka I*)[11] (Kwd App. C & D).

In refusing to grant an implied immunity from the antitrust laws, the court below properly decided the law. Union was never compelled nor authorized by the FERC to impose a price squeeze on plaintiffs, and there is no conflict between the Federal Power Act and the antitrust laws with respect to price squeeze claims. Union cites no precedent supporting the specific implied immunity requested, while there is ample case support for no antitrust exemption of price squeeze conduct. This Court has denied review on this issue before and should deny review again.

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[10]An agency's denial of exclusive jurisdiction over an antitrust issue is an important factor in determining whether implied immunity for the antitrust laws should be granted. Sound, Inc. v. Am. Tel. & Tel. Co., 631 F.2d 1324, 1331 (8th Cir. 1980) ("Unlike the SEC in the [*Gordon* and *NASD*] stock exchange cases, the FCC has strongly urged that its jurisdiction should not displace the antitrust law"); *see* United States v. Radio Corp. of Am., 358 U.S. 354, 365 n. 18 (1959).

[11]The General Counsel and the Solicitor of the FERC assisted the Solicitor General of the United States in the preparation of this brief. Thus, the brief expresses the views of the FERC.

B. Missouri Retail Rate Regulation Does Not Exempt Union's Price Squeeze From The Antitrust Laws.

There is no federal statute expressly authorizing a state to adopt a program compelling electric utilities to engage in price squeeze conduct,[12] nor is there any provision in the Missouri statutes expressly granting electric utilities the right to price squeeze retail-level competitors.[13] Union argues for an implied immunity on the grounds that its price squeeze conduct was the product of state compulsion and that the Missouri Public Service Commission (MPSC) had a clearly articulated, affirmatively expressed, and actively supervised policy on price squeeze conduct inconsistent with the antitrust laws. Union cannot establish either of these arguments.

Union argues that, because its retail rates are regulated, the MPSC controls its price squeeze conduct. But the MPSC never ordered Union to create a wholesale/retail rate disparity nor is that rate disparity the product of MPSC regulation. This is not a situation where "the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it . . . ." *Cantor v. Detroit Edison Co.,*

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[12]*Compare,* McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1111, *et. seq.* (1977) (Business of insurance exempt to the extent it is established by state law).

[13]*Compare,* Parker v. Brown, 317 U.S. 341, 346 (1943) (California Agricultural Prorate Act authorizing restrictions on raisin production "so as to restrict competition among growers and maintain prices in the distribution of their commodities to packers."); New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96, 99-103 (1978) (California Automotive Franchise Act requiring a motor vehicle manufacturer to secure the approval of a state board before it could open a dealership within an existing franchisee's market area, if the existing franchisee objected).

428 U.S. 579, 594-5 (1976). It is Union that initiates when and at what level it will file its requested retail and wholesale rate increases. *Mishawaka I,* 560 F.2d at 1320.

Union further argues that Missouri's electric rate regulation is designed to displace *all* competition. But the mere existence of state rate regulation does not establish an intention by the state to authorize a private utility's particular anticompetitive behavior. In *Cantor,* a utility's program of distributing free light bulbs to its electricity customers was held not exempt even though the program was set forth in a tariff approved by a state agency and could not be abandoned without state agency approval. In establishing the MPSC, Missouri set forth no "clearly articulated and affirmatively expressed" policy inconsistent with the antitrust laws. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U.S. 97, 105 (1980). The vague dicta of *May Department Stores Co. v. Union Electric Co.,* 107 S.W.2d 41, 48 (Mo.S.Ct. 1937), cited by Union at page 13 of its petition, is hardly such a policy. If anything, Missouri's policy on price squeeze behavior is *consistent* with the antitrust laws. Rates which are "unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of law" are barred by Missouri law. Mo. Rev. Stat. § 393.140(5) (1978).

Certainly Union's price squeeze conduct is not "actively supervised" by the MPSC. *California Retail Liquor Dealers Association,* 445 U.S. at 105. As the court below correctly pointed out, "while UE's individual wholesale and retail rates are 'actively supervised' by the FERC and [M]PSC, Kirkwood challenges the interrelation of those rates, which is under the authority of neither Commission." 671 F.2d at 1180, Union App. A-13. Union's citation to *FPC v. Conway Corp.,* 426 U.S. 271

(1976) and discussion of the FERC's requirement to consider antitrust claims does not show the MPSC actively supervised a state regulatory policy inconsistent with the antitrust laws.

In refusing to grant an implied immunity from the antitrust laws on the basis of state action, the court below properly applied the standards of this Court expressed in *California Retail Liquor Dealers Association.* There is no clearly articulated and affirmatively expressed Missouri policy compelling or authorizing an electric utility's price squeeze behavior. Union cites no precedent supporting its claim to an immunity and points to no conflict in the circuits. This Court has previously denied review to a case finding no state action exemption for electric utility price squeeze conduct and should do so again.

III. THE COURT BELOW CORRECTLY HELD THAT ELECTRICITY IS A COMMODITY UNDER SECTION 2(a) OF THE CLAYTON ACT AS AMENDED BY THE ROBINSON-PATMAN ACT.

Union argues that whether electricity is a "commodity" for the purpose of the Robinson-Patman Act, 16 U.S.C. § 13(a) (1976), is an important federal question not settled by this Court. However, this Court has consistently declined to review lower court decisions interpreting the word "commodity" for a wide variety of items, preferring to let the lower courts evolve workable criteria for such a determination.[14] Moreover, as to Section 3 of the Clayton Act,

[14] *E.g.*, Export Liquor Sales, Inc. v. Ammex Warehouse Co., 426 F.2d 251 (6th Cir. 1970)(exclusive right to sell liquor at lessor's tunnel between United States and Canada), *cert. denied,* 400 U.S. 1000 (1971); Columbia Broadcasting System v. Amana Refrigeration, Inc., 295 F.2d 375 (7th Cir. 1961) (sponsorship identification of television program), *cert. denied,* 369 U.S. 812 (1962); Fleetway, Inc. v. Pub. Serv. Interstate Transp. Co., 72 F.2d 761, 763 (3d Cir. 1934) (transportation by busses), *cert. denied,* 293 U.S. 626 (1935).

this Court has previously declined to review a case holding electricity is a commodity.[15] *Pennsylvania Water & Power Co. v. Consolidated Gas,* 184 F.2d 552, 559 (4th Cir. 1950), *cert. denied,* 340 U.S. 906 (1950). Union offers no persuasive reason for altering this policy, in general or as applied to electricity.

Union's purported conflict in the circuits is considerably overstated. *City of Newark v. Delmarva Power & Light Co.,* 467 F. Supp., 763 (D. Del. 1979) was decided by a district court which sought to immunize regulated utilities from the antitrust laws. 467 F. Supp. at 769-71. The district court's underlying philosophy was subsequently rejected in its own circuit. *Essential Communications Systems, Inc. v. American Telephone & Telegraph Co.,* 610 F.2d 1114 (3d Cir. 1979). Moreover, the two subsequent decisions on the issue severely criticize *City of Newark* and hold electricity is a commodity. *City of Gainesville v. Florida Power & Light Co.,* 488 F. Supp. 1258, 1279-1283 (S.D. Fla.

[15]When the Clayton Act was enacted in 1914, both § 2 (barring primary-line price discrimination) and § 3 (barring exclusive dealing arrangements) were limited to transactions involving "commodities," a term undefined by the Act. The Robinson-Patman Act of 1936 amended § 2 of the Clayton Act to add secondary-line price discrimination, but nothing in its legislative history evidenced a Congressional intent to redefine the word "commodities." Thus, decisions interpreting "commodities" for § 3 of the Clayton Act are applicable to § 2 of the Clayton Act, as amended by the Robinson-Patman Act. Baum v. Investors Diversified Services, Inc., 409 F.2d 872, 875 (7th Cir. 1969).

1980)[16]; *Town of Norwood v. Boston Edison Co.*, No. 74-4104-T (D. Mass. May 7, 1982) (order affirming Special Master's report of May 12, 1980) (Kwd App. E). Union also cites to *City of Groton v. Connecticut Light & Power Co.*, 497 F. Supp. 1040, 1052 n. 14 (D. Conn. 1980) (*Groton II*), *aff'd in part, rev'd in part,* 662 F.2d 921 (2d Cir. 1981) as support, but the court's comments were plainly *dicta* since plaintiffs in that case had already abandoned their Robinson-Patman Act claim. Finally, Union's other citations are to cases not dealing with electricity and establishing no principles contrary to *Gainesville and Norwood.*[17] Thus, the weight and trend of the better-reasoned authority holds electricity to be a commodity.

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[16]At page 17 of its petition, Union criticizes *Gainesville's* analogy of electricity to other forms of energy found to be commodities. Union argues "that coal and gasoline are fuels which have 'grade and quality' which can be determined and compared, which is not true of electric energy." The Robinson-Patman Act is concerned with discrimination "in *price* between different purchases of commodities of *like* grade and quality . . . ." 15 U.S.C. § 13(a) (1976) (emphasis added). Since wholesale and retail electricity are commodities of *like* grade and quality, discrimination in price is unjustified. The definition of "commodities" in the Act does not depend on the capacity of the products to be subdivided by grade and quality.

[17]Am. Tel. & Tel. Co. v. Delta Communications, Inc., 408 F. Supp. 1075, 1114 (S.D. Miss. 1976) (network program and national advertising packages), *aff'd,* 549 F.2d 972 (5th Cir. 1978), *cert. denied,* 444 U.S. 926 (1979); Ambook Enterprises v. Time, Inc., 612 F.2d 604, 609 (2d Cir. 1979) (sale of newspaper ads), *cert. denied,* 448 U.S. 914 (1980); Aviation Specialists, Inc. v. United Technologies Corp., 568 F.2d 1186, 1191 (5th Cir. 1978) (repair contracts); Baum v. Investors Diversified Services, Inc., 409 F.2d 872, 875 (7th Cir. 1969) (shares in a mutual fund).

Union's remaining arguments that a commodity must be a good and that, somehow, there is a conflict between the Federal Power Act and the Robinson-Patman Act both have been crisply disposed of in *Gainesville*. Electricity is a good, and antitrust immunities are not lightly implied. Union's arguments do not come to grips with the most recent precedent.

The decision of the court below is not in conflict with any prior decisions of this Court, nor is there any basis to alter this Court's policy favoring development of criteria for defining a commodity for the Robinson-Patman Act by the lower federal courts, both in general and as applied specifically to electricity. The weight of authority favors finding electricity a commodity and should not be disturbed.

IV. CONCLUSION

The court below properly reversed the district court's grant of defendant Union's motion for summary judgment and remanded the case for trial. Union's claims to antitrust immunity were fully considered and properly decided. The decision is not in conflict with any of this Court's precedents nor is there any significant conflict in the circuits. As to the *Noerr-Pennington* immunity, the federal implied immunity, and the state action exemption, these issues have been previously raised before this Court and review denied. As to the electricity as a commodity issue, Union offers no persuasive reason why this Court should disturb the lower federal courts' proper development of the law. Therefore, Union's petition for certiorari should be denied.

Respectfully submitted,

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July 14, 1982

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1521 September Term, 1981

City of Kirkwood, a Municipal Corporation, Appellant,	)	
vs.	)	Appeal from the United States District Court for the Eastern District of Missouri.
Union Electric Company, a Corporation, Appellee.	)	

On motion of appellee, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of sixty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

April 14, 1982

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CITY OF SHAKOPEE, MINNESOTA, a municipal corporation,	)	
Plaintiff,	)	Civ. No. 4-75-591
vs.	)	
NORTHERN STATES POWER COMPANY, a Minnesota corporation,	)	MEMORANDUM AND ORDER
Defendant.	)	

J. Leroy Thilly, BROADMAN, SUER, CURRY & FIELD, 131 West Wilson Street, Madison, Wisconsin 53703

Philip R. Krass, Assistant City Attorney, KRASS & MANAHAN, 1221 East Fourth Avenue, Shakopee, Minnesota 55379

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I. INTRODUCTION

This matter is before this Court upon Defendant Northern States Power Co.'s (NSP) motion pursuant to Rule 12(b), Fed. R. Civ. P. to dismiss this antitrust action upon the ground that the Federal Power Commission (FPC) has ex-

clusive jurisdiction to hear the issues herein presented and to grant any relief which may be appropriate. For the reasons hereafter discussed, this Court has determined that this motion must be denied.

II. FACTS

The City of Shakopee (Shakopee) charges that NSP has used its monopoly position in the wholesale power market to monopolize, and attempt to monopolize, interstate trade and commerce in the distribution and sale of electrical power at retail to large industrial customers, in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. Specifically, Shakopee charges NSP with purposefully maintaining a "dual rate structure" for the wholesale and retail sale of electric power which makes it impossible for Shakopee to compete with NSP for large industrial customers in the Shakopee area.

NSP supplies electrical power to municipalities, like Shakopee, at a rate which is set by the FPC (wholesale rate). Shakopee, in turn, sells this power to its residents, including large industrial customers.

NSP also sells power directly to large industrial customers in a portion of Shakopee where the service zones of NSP and Shakopee overlap. The rate which these large industrial customers of NSP pay is set by the Minnesota Public Utilities Commission (PUC) (retail rate). This "retail" rate is lower than the "wholesale" rate Shakopee must pay to buy the same power directly from NSP. Therefore, without even considering Shakopee's added costs of transmission, it is impossible for Shakopee to sell power to these large industrial customers in the overlap zone, at a rate competitive with NSP's rate.

Shakopee claims that the effects of this dual rate structure includes, but is not limited to, a loss to it of the business of the large industrial customers in the overlap zone. Additionally, Shakopee charges that new industry will not locate in Shakopee if it must pay a higher power rate. Finally, existing industrial customers are pressuring Shakopee not to expand its service area and to get out of the power business altogether. Shakopee thus complains that it faces, alternatively, a loss of existing and new industry or limiting, or abandoning, its power business. The elimination of Shakopee from the power business would, of course, leave NSP as the only supplier in the Shakopee power market.

In arguing against antitrust liability, NSP points out that both the "wholesale" and "retail" power rates are set by governmental regulatory agencies, the FPC and PUC, respectively. Therefore, NSP argues, it is the responsibility of the PUC or FPC to remedy the anticompetitive effects, if any, of this dual rate structure. Furthermore, since Shakopee has chosen to limit its attack here to the conduct of NSP in applying for and winning approval of the wholesale rate, NSP argues that the FPC has exclusive jurisdiction over the anticompetitive conduct charged herein.

III. LAW

It is no longer open to question that dual rate structures in the sale and distribution of electrical power can be found to have an anticompetitive effect. *FPC v. Conway Corp.*, ____ U.S. ____, 96 S.Ct. 1999 (1976) (*Conway*). The question remaining is whether or not the FPC has the

exclusive jurisdiction to make that determination, to the exclusion of the antitrust laws. This Court has concluded that no such exclusive jurisdiction exists in the FPC because no antitrust immunity can be implied for the type of conduct complained of here.

In *Conway* the Supreme Court held that the FPC has a duty to consider allegations by a power company's wholesale customers (seven municipalities and two electrical cooperatives) that proposed wholesale rates, which are within the commission's jurisdiction, are discriminatory and noncompetitive when considered in relation to the power company's retail rates, which are not within the commission's jurisdiction.

There is nothing in the language of *Conway* which suggests that FPC jurisdiction is exclusive. Indeed, prior to *Conway* the FPC had refused to consider any anticompetitive effects in setting the wholesale rates.

The Supreme Court has, on many occasions, repeated the proposition that immunity from the antitrust laws "is not favored and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *Cantor v. Detroit Edison Co.*, ____ U.S. ____, 96 S.Ct. 3110, 3120 (1976) (*Cantor*); *United States v. National Association of Securities Dealers*, 422 U.S. 694, 720 (1975); *see also, United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963); *United States v. Borden Co.*, 308 U.S. 188, 197-206 (1939).

Most recently in *Cantor*, the Supreme Court stated that: "since our decision in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed. 2d. 359

[1973] [*Otter Tail*][1], there can be no doubt about the proposition that the federal antitrust laws are applicable to electrical utilities." ____ U.S. at ____, 96 S.Ct. at 3120[2].

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[1]The Defendant in *Otter Tail* made an argument for antitrust immunity similar in many respects to NSP's argument, that since the FPC has the duty under the Federal Power Act to consider anticompetitive conduct in setting rates, its power to do so is exclusive Otter Tail Power Co. argued that since the FPC had the authority under the Federal Power Act to remedy the complained of violation by ordering an involuntary interconnection of power, that therefore, the jurisdiction of the FPC over the alleged anticompetitive conduct was exclusive. The Supreme Court, in rejecting this argument, stated as follows:

"There is nothing in the legislative history [of the Federal Power Act] which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible, consistent with the public interest." 410 U.S. at 373-374, 93 S.Ct. at 1028.

The cases cited by NSP are not [] apposite. *Montana-Dakota Utilities Co. v. Northwestern Public Services Co.*, 341 U.S. 246 (1951) was not an antitrust action and therefore is no authority for implying antitrust immunity. The Plaintiff power company merely wanted a refund from Defendant power company because it believed that it was charged an excessive rate.

Similarly, *McLean v. El Paso Natural Gas Co.*, 357 F. Supp. 329 (S.D. Tex. 1972) while claiming an antitrust violation, is an action attacking the rate itself, not a discriminatory application process. In any event, the continuing validity of this case is questionable in light of *Otter Tail* and *Cantor*.

City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) and *North Carolina v. FPC*, 393 F. Supp. 1116 (M.D. N.C. 1975) involve procedural avenues for attacking FPC orders, not anticompetitive conduct in the application process.

For a general discussion of antitrust immunity and its relationship to exclusive jurisdiction, see this Court's Opinion in *International Travel Arrangers v. Western Airlines*, 408 F. Supp. 431 (D. Minn. 1975).

[2]The Chief Justice expressly concurred in this portion of the Court's Opinion herein quoted or discussed ____ U.S. ____, 96 S.Ct. at 3123.

The Court went on to say that it "has consistently refused to find that regulations give rise to implied exemptions [from the antitrust laws] without first determining that exemption was *necessary* in order to make the regulatory act work, 'and even then only to the minimum extent necessary.'" ____ U.S. ____, 96 S.Ct. 3120 (footnote omitted) (emphasis supplied).

Finally, the Court made it clear that the same test of "necessity" is to be applied to exemption from the antitrust laws in the case of either federal or state regulation. ____ U.S. ____, 96 S.Ct. 3120 Text and n. 36.

Cantor and *Otter Tail* foreclosed any argument that the public utilities enjoy any general exemption from the antitrust laws as may exist in the securities field.[3] *See, United States v. National Association of Security Dealers, supra; Gordon v. New York Stock Exchange,* 422 U.S. 659 (1975).

However, while no general exemption can be found, this Court must determine whether or not, based on the specific facts of this case, it is "necessary" to the functioning of the wholesale regulatory scheme for NSP to be immunized from antitrust liability. This Court concludes that no such necessity exists and that there is, in fact, little or [no] apparent conflict between applying the antitrust laws to the type of conduct complained of here and the smooth and efficient functioning of the FPC's regulatory scheme.

Cantor is authority for the proposition that anticompetitive conduct by a regulated power company in applying for a tariff rate, is subject to the antitrust laws.

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[3] *Accord, California v. FPC,* 369 U.S. 482 (1962).

Cantor involved anticompetitive conduct in the promotion and proposing of retail power rates. The rate proposed by the defendant power company included as one of its costs, the furnishing to customers, free of additional charge, replacement electric light bulbs. The state regulatory agency approved this lightbulb exchange program as part of the tariff rate. Charged with an unlawful tie-in under the antitrust laws, the power company relied on the fact that once the state approved the lightbulb exchange program, as part of the tariff application, the company was bound by state law to continue to supply those lightbulbs at least until a new tariff was applied for and approved. Therefore, the company argued, it was immune from the operation of the antitrust laws under the state action doctrine of *Parker v. Brown,* 317 U.S. 341 (1943)[4]. The Supreme Court, after setting down the test of "necessity" applicable to both state and federal regulatory schemes[5], found that no such "necessity" for antitrust immunity was presented, because even though required by state law, the lightbulb program was "the product of a decision in which both the respondent [power company]

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[4]The Supreme Court in *Cantor* likewise rejected an analogous attack based on *Eastern Ry. Presidents Conference v. Noerr Motor Freight* 365 U.S. 127 (1961). *See also, United Mine Workers v. Pennington,* 381 U.S. 657 (1965). ____ U.S. at ____, 96 S.Ct. at 3122. While the majority sought to distinguish *Noerr* on the grounds that it did not involve exemption for private action taken in compliance with the state law, this Court must agree with the logic of the dissenters in *Cantor* that the majority's decision substantially restricts the right of a public utility to engage in anticompetitive conduct in the petitioning process.____ U.S. at ____, 96 S.Ct. at 3134. After *Cantor* and *California Motor Transport Co. v. Trucking, Unlimited,* 404 U.S. 508 (1972), the so-called *Noerr-Pennington* doctrine must be viewed as severely limited.

[5]*See,* discussion *supra,* at pages 4 and 5.

and the Commission participated." ____ U.S. at ____, 96 S.Ct. at 3118. The Court went on to say:

> Respondent could not maintain the lamp exchange program without the approval of the Commission, and now may not abandon it without such approval. Nevertheless, there can be no doubt that the option to have or not to have such a program is primarily respondents, not the Commission's. Id. (Footnote omitted)

The reasoning of the *Cantor* decision appears to be that if an anticompetitive practice is the product, at least in part, of the company being regulated, and could be avoided if the company chose to do so, then the anticompetitive condition is in reality the work of that company and is not "necessary" to the functioning of the regulatory scheme and will not be immunized from antitrust liability. As the Court in *Cantor* explained, approval of the proposed tariff did not increase the power company's risk of violating the law. ____ U.S. at ____, 96 S.Ct. at 3121. Similarly, the FPC approval of wholesale rates proposed by NSP has not increased NSP's risk of violating the antitrust laws.

It is sufficient to defeat this motion that the evidence may prove that NSP could easily have avoided the alleged monopoly position by tailoring its applications to allow for competitive "wholesale" and "retail" power rates. If this is not proved, then the conclusion would be that NSP has not *in fact* engaged in anticompetitive conduct in making its rate applications, not that such conduct is immune from antitrust liability.

No meaningful distinction can be made between the purposeful conduct charged here, which results in discriminatory and anticompetitive power rates, and similar conduct, as in *Cantor,* which results in an unlawful

tie-in. Neither situation is "necessary" to the functioning of the regulatory scheme[6].

Finally, it does not appear that it would be necessary for this Court to become involved in the process of setting rates in order to grant full and fair relief to Shakopee. In the event that Shakopee proves itself entitled to relief it would in no way disrupt the regulatory process for this Court to uphold an award of damages for past an-

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[6]*Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945) relied on by both Shakopee and NSP, does not mandate a dismissal of the prayer for damages. In that case, Georgia was permitted to maintain an action to enjoin a conspiracy between common carriers to fix shipping rates in a manner which discriminated against Georgia products. In *United States v. Radio Corporation of America*, 358 U.S. 334 (1959) the Court had occasion to explain its decision in *Georgia*, not to permit a recovery of damages, as based on its unwillingness to interfere with rate structures and regulatory schemes which require expert skill to administer. However, the Court went on to say that where there is *"no pervasive regulatory scheme, and no rate structure to throw out of balance,* sporadic action by the Federal Courts can work no mischief." 358 U.S. at 350 (footnote omitted) (emphasis supplied).

Apart from the fact that in *Cantor* the Supreme Court has shown a willingness to interfere with rate structures which contain anticompetitive components, in the case at bar, there is no pervasive regulatory scheme or rate structure to throw out of balance. The discrimination alleged here is not between rates set by one regulatory agency, as was the case in *Georgia*, but rather is between the "wholesale" rate set by the FPC and the "retail" rate over which the FPC has no jurisdiction. Put simply, under these circumstances, antitrust immunity is not "necessary" to the functioning of the regulatory process because the discrimination is "external" to that process. The FPC does not control both ends of the discriminatory conduct.

Furthermore, the fact that the FPC can consider the anticompetitive effect of its wholesale rate does not displace the antitrust laws anymore than does similar power residing in the Interstate Commerce Commission. *United States v. Radio Corporation of America, supra*, 358 U.S. at 351-352.

ticompetitive conduct or to enjoin specified future anticompetitive conduct on the part of NSP in making and promoting its rate applications. In conclusion, this Court can find no reason for immunizing the conduct alleged herein from antitrust liability[7].

This Court finds NSP's remaining arguments for dismissal to be without merit. Therefore, for the reasons heretofore discussed, this motion to dismiss must be, and hereby is, denied.

IT IS SO ORDERED.

Dated: Oct. 18, 1976.

/s/

Miles W. Lord
United States District Judge

[7]In a recent letter to the Court, NSP's counsel argues that because Shakopee has now brought its anti-competitive allegations to the FPC in an Amended Petition to Intervene dated October 6, 1976, NSP's motion to dismiss is further strengthened. In light of the discussion in this Memorandum and Order, NSP's argument is not relevant to the legal issue before this Court. *See,* discussion *supra,* page 3.

In the Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN ELECTRIC POWER CO., INC., ET AL.,
PETITIONERS

v.

CITY OF MISHAWAKA, INDIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1980

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BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

QUESTIONS PRESENTED

1. Whether either the *Noerr-Pennington* doctrine or the Federal Power Act shields a utility from liability under Section 2 of the Sherman Act when its unilateral wholesale and retail rate-making actions, together with other conduct, reflect a specific intent to injure competition.

2. Whether the "state action" doctrine recognized in *Parker v. Brown*, 317 U.S. 341 (1943), and subsequent cases protects a monopolist from liability under Section 2 of the Sherman Act for manipulating federally-regulated wholesale

rates and state-regulated retail rates as part of a broader scheme to injure competition.

* * *

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner American Electric Power Co. (AEP) is an investor-owned public utility holding company. Petitioners American Electric Power Service Corporation and Indiana & Michigan Electric Company (I&M) are wholly owned subsidiaries of AEP (Pet. App. 107a). I&M is a public utility within the meaning of Section 201 of the Federal Power Act, ch. 687, 49 Stat. 847, 16 U.S.C. 824. It generates, transmits, and sells electric energy to both wholesale and retail customers in a service area that encompasses parts of Indiana and Michigan (*ibid.*). I&M's wholesale rates are subject to the jurisdiction of the Federal Energy Regulatory Commission (Federal Commission) pursuant to Part II of the Federal Power Act (16 U.S.C. 824-824h). Retail rates of I&M are regulated by state authorities in Indiana and Michigan.

Public utilities like petitioner I&M must file with the Federal Commission "schedules showing all [wholesale] rates and * * * all contracts which in any manner affect or relate to such rates" (16 U.S.C. 824d(c)). During the period pertinent to this litigation, I&M was required to provide 30 days' notice to the Federal Commission and the public prior to any modification of such rates or contracts (16 U.S.C. 824d(d)).[1] The Federal Commission may

[1]The 30-day period was extended to 60 days in 1978 by Pub. L. No. 95-617, Title II, Sections 207(a), 208, 92 Stat. 3142.

suspend any change in rate schedule and delay the use of a proposed rate for up to five months, and may hold a hearing "concerning the lawfulness of such rate[s]" (16 U.S.C. 824d(e)). If a hearing is not completed prior to the expiration of the five month suspension period, the proposed new schedule takes effect, but the Commission may require the utility to maintain an accurate account of amounts received by reason of the rate increase and to refund with interest any portion subsequently found "not justified" (*Ibid.*).

On its own motion or on complaint, the Commission may initiate a hearing to determine whether any previously established "rate * * * or contract" is "unjust, unreasonable, unduly discriminatory or preferential," and an affirmative finding invests the Commission with authority to establish a just and reasonable rate or contract to be thereafter observed (16 U.S.C. 824e(a)). Although the Commission may disapprove existing or suspended utility rates and prescribe future rates, it may not order reparations with respect to rates that were not suspended. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951).

Petitioner I&M must file its retail electric rates with the Public Service Commissions of Indiana and Michigan. Proposed retail rates must be approved by the respective commissions prior to being placed in effect. Ind. Code Ann. §§ 8-1-2-1, 8-1-2-38, 8-1-2-42 (Burns 1973); Mich. Stat. Ann. §§ 22.13(6), 22.13 (6a) (1970). I&M retains, however, unilateral authority to propose new rates. Ind. Code Ann. § 8-1-2-42 (Burns 1973); Mich. Stat. Ann. § 22.13(6a) (1970).

Respondents are ten municipalities that operate electric distribution systems, purchase all, or nearly all, of their

electric energy at wholesale from I&M, and retail that electricity in competition with I&M (Pet. App. 110a-117a).

2. Respondents filed an antitrust action against petitioners seeking injunctive relief and damages for an alleged attempt to monopolize and monopolization of the retail sale of electric power in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. The amended complaint alleged that I&M engaged in various types of anticompetitive conduct, including a predatory price squeeze effectuated by filing with the Federal Commission wholesale rates in June 1972 and May 1976. Those rates, which applied to respondents, exceeded I&M's retail rates for industrial customers located in or near respondent's service areas. The district court[2] and the court of appeals[3] refused either to dismiss the complaint for lack of jurisdiction or to stay proceedings pending the completion of inquiries by the Federal Commission into the lawfulness of I&M's 1972 and 1976 wholesale rates. This Court denied certiorari,[4] and, on remand, the case went to trial.

The district court found that respondents operate electric utilities within the service area of I&M, that each is wholly dependent on I&M for its bulk power, that I&M possesses a monopoly in the retail sale of electric power within its service area, and that I&M competes with respondents for the patronage of all consumers residing within respondents' corporate limits (Pet. App. 48a). I&M and respondents further compete for individual customers

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[2]See Pet. App. 180a-199a.

[3]See *id.* at 157a-178a.

[4]436 U.S. 922 (1978). In a brief *amicus curiae*, the United States and the Federal Commission urged that certiorari should be denied.

actually located or contemplating location in each town or elsewhere in I&M's service area (*ibid.*). The district court also found (*id.* at 57a-77a) that petitioners had engaged in a series of anticompetitive and exclusionary actions with the specific intent and effect of preserving and augmenting I&M's monopoly power over retail sales of electricity. This course of conduct included (1) charging respondents unjust and unreasonable rates for wholesale electric power (rates subsequently disapproved by the Federal Commission), in excess of I&M's comparable retail rates and without cost justification; (2) disregarding obligations under the Federal Power Act to file wholesale rates only after considering their relationship with I&M's comparable retail rates and the possible anticompetitive effects caused by the wholesale-retail rate relation; and (3) repeatedly attempting to undermine respondents' source of power and competitive viability by threatening to terminate service and to impose short term, restrictive supply contracts. Accordingly, the district court concluded that petitioners had violated Section 2 of the Sherman Act through a combination of actions motivated by a specific intent to impair resondents' ability to compete, thereby maintaining or bolstering I&M's existing monopoly (Pet. App. 71a-77a). The district court rejected petitioners' contention that the *Noerr-Pennington* doctrine precluded reliance on the anticompetitive effects of I&M's wholesale and retail rate relationships to establish an antitrust violation (Pet. App. 77a-81a).

The district court awarded damages to respondents based on the difference between the unlawful wholesale rates charged by I&M and I&M's lower comparable retail rates (Pet. App. 86a-87a). In addition, the court directed petitioners in preparing and filing wholesale rates with the Federal Commission to take into account the relationship

between anticipated first year billings to respondents and the billings that would result if I&M's retail rates were charged. I&M also was enjoined from charging any wholesale rate that would produce expected billings in excess of amounts that would be collected if retail rates were charged, until the Federal Commission determined that the wholesale rate was just and reasonable (Pet. App. 91a).

By a unaminous vote, the court of appeals affirmed the district court's conclusion regarding petitioners' Sherman Act liability, but vacated and remanded on issues of relief. The court of appeals noted that its prior decision in this litigation[5] had established that I&M's anticompetitive actions were subject to the Sherman Act, and that the Federal Commission had neither exclusive nor primary jurisdiction over respondents' complaint (Pet. App. 8a). The court rejected the argument that the *Noerr-Pennington* and "state action" doctrines protected petitioners from antitrust liability resting in part on the intended anticompetitive relationship of I&M's wholesale and retail rates (*id.* at 13a-23a).

The court of appeals concluded, however, that the district court had incorrectly awarded antitrust overcharge damages based on the difference between I&M's unlawfully inflated wholesale rates and the retail rates I&M was then charging. It found no support for the district court's assumption of identity between a proper new wholesale rate and the existing retail rate. Instead, it held that the Federal Commission's refund order constituted the best

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[5] *City of Mishawaka v. Indiana & Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977), cert. denied, 436 U.S. 922 (1978).

measure of overcharge damages,[6] and that any other damages "should be based on proof of specific injuries suffered as a result of the utility's overcharges and other monopolistic practices" (Pet. App. 26a-30a). The court of appeals further held that respondents were entitled to damages for litigating costs incurred before the Federal Commission that were necessitated by I&M's threatened curtailment of their wholesale supply of electricity (Pet. App. 31a). The district court's injunction, which circumscribed petitioners' right to charge respondents wholesale rates in excess of comparable retail rates, was vacated and remanded for additional proceedings (*id.* at 35a-37a).

DISCUSSION

The decision of the court of appeals is correct and is not in conflict with any decision of this Court or any other circuit. The decision applies settled principles of law to the facts of this particular case. Review by this Court is therefore unwarranted.

1. Petitioners' contention (Pet. 16-19) that the *Noerr-Pennington* doctrine forecloses antitrust scrutiny of their unilateral decisions respecting wholesale rates filed with the Federal Commission was correctly rejected by the lower courts. The *Noerr-Pennington* doctrine reflects a rule of statutory construction that declines to impute to

[6]While the present case was pending before the court of appeals, the Federal Commission was conducting proceedings to determine whether I&M's wholesale electricity rates for 1976-1978 were unjust or unreasonable. Following the court's decision, the Federal Commission determined that the rates were, in fact, unjust and unreasonable. See pages 9-10, *infra*.

Congress an intent to penalize bona fide attempts by private parties to influence public officials to make decisions that have the effect of restraining competition.[7] In such cases, of course, it is governmental action which is the proximate or direct cause of the competitive restraint. By contrast, the anticompetitive effect in this case occurred not as a result of governmental action, but from private rate filings that preceded any governmental action thereon. Indeed, it was the delay in governmental action that made it possible for I&M to injure respondents by its rate filings. It knew that its wholesale rate proposals would go into effect prior to a Federal Commission determination of their reasonableness, while its proposals for higher retail rates in all likelihood would not become effective until long after the new wholesale rates became effective. It was the anticipated postponement of regulatory action that enabled I&M to impose a price squeeze on respondents.[8]

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[7]See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (collective activity designed to influence the passage or enforcement of laws); *United Mine Workers v. Pennington*, 381 U.S. 657, 669-672 (1965) (collective activity to influence the Secretary of Labor in setting minimum wages and to influence officers of the TVA in coal purchasing decisions); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (collective activity to influence the decisions of administrative or judicial bodies); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 379-380 (1973) (unilateral decision of utility monopolist to sponsor litigation).

[8]A monopolist violates Section 2 of the Sherman Act by engaging in a price squeeze if its wholesale rates unduly impede its wholesale customers from competing with it in the retail market, and if the monopolist sets its wholesale rates with the intent to achieve that effect. See *United States v. Aluminum Co. of America*, 148 F.2d 416, 436-438 (2d Cir. 1945).

In short, I&M's rate filings were designed to forestall, rather than cause, governmental action. Under the controlling statute, the filed rates became effective unless and until the Federal Commission suspended them, and I&M obviously hoped that its filing and supporting data would simply be accepted by the Commission without any suspension and investigation. Thus, I&M's rates filings were made with the clear understanding that the rates contained therein would often become effective immediately and have the effect of damaging I&M's competitors for retail business. To that extent, they were private actions intended to have a direct effect without the intervention of a governmental body. In this context, it is clear that whatever First Amendment interest may be implicated ultimately by I&M's tariff filings, that interest does not shelter petitioners from antitrust liability based on their own immediately effective rate setting activities (see Pet. App. 16a).

Moreover, petitioners' *Noerr-Pennington* argument is flatly inconsistent with *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 601-602 (1976), where this Court held that the mere fact that a regulatory body may approve a private tariff proposal does not make the proposing party's conduct immune from antitrust scrutiny under *Noerr-Pennington*. See also *California v. FPC*, 369 U.S. 482, 488-489 (1962); *United States v. R.C.A.*, 358 U.S. 334. 350-351 (1959) (private decisions to acquire assets remain subject to antitrust scrutiny even though the acquisition was contingent on regulatory approval). By focusing on the request for state approval, petitioners' *Noerr* argument would undercut this Court's repeated holding that state authorization of private restraints does not immunize the private conduct from the federal antitrust laws. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal*

Aluminum, Inc., 445 U.S. 97 (1980); *Cantor v. Detroit Edison, supra.*[9]

2. Petitioners also argue (Pet. 20-25) that the court of appeals improperly intruded on the ratemaking province of the Federal Commission by suggesting the possibility (Pet. App. 28a) that the district court might independently calculate antitrust damages ascribable to petitioners' unlawful wholesale-retail price squeeze. They assert that if the district court undertakes this task, its action would conflict with the Federal Commission's authority to determine just and reasonable wholesale rates. That argument, however, is plainly not ripe for review. While the court of appeals indicated that the district court could make its own overcharge assessment for the 1976-1978 period based on the Federal Commission's decision that the 1972-1976 rates were unreasonable, it clearly advised the district court to defer to the Federal Commission's then pending inquiry into the reasonableness of I&M's 1976 wholesale rates (Pet. App. 27a-28a). Subsequent to the decision of the court of appeals, the Federal Commission determined that I&M's rates were unjust, unreasonable, and unduly discriminatory.[10] The possibility that the district court will nevertheless endeavor to establish a just and reasonable wholesale rate for the 1976-1978 period in conflict with the Federal Commission's decision (despite the court of appeals' strong urging to the contrary) is wholly speculative and does not warrant review by this Court.

[9]We assume that the *Noerr-Pennington* doctrine would preclude the imposition of antitrust liability based solely upon the filing of tariffs intended in good faith to elicit governmental action. But the charging of rates under tariffs, as part of a broad scheme to monopolize by imposition of a price squeeze, is not immune from antitrust scrutiny. As *Cantor v. Detroit Edison, supra,* makes clear, *conduct* undertaken pursuant to a tariff is not necessarily shielded from antitrust liability simply because the conduct is described in a tariff.

[10]See Respondents' Br. in Opp. 15-16 n. 10.

Similarly speculative is any concern over possible injunctive relief. The court of appeals set aside the district court's injunctive order (Pet. App. 37a) and remanded with instructions to fashion a narrower decree that does not unduly infringe on the Federal Commission's rate making authority (*ibid).*

3. Petitioners renew the contention (Pet. 25-26) advanced in I&M's petition to this Court in No. 77-689, *cert. denied,* 436 U.S. 922 (1978), that the court of appeals erred in refusing to hold that the Federal Power Act repeals by implication Section 2 of the Sherman Act, as it applies to I&M's manipulation of its wholesale and retail rates with a specific intent to injure competition.[11] For the reasons set forth on pages 8-13 of the Brief for the United States as amicus curiae in No. 77-689, petitioners' contention is without merit.

4. Petitioners also maintain (Pet. 26-27) that the state action doctrine of *Parker v. Brown,* 317 U.S. 341 (1943), precludes Sherman Act liability for their intentional anticompetitive price-squeeze tactics because I&M's retail rates were approved by state authorities. The foundation of petitioners' price-squeeze liability, however, was not the level of I&M's retail rates *simpliciter;* rather, liability was predicated on the anticompetitive effects caused by the *relationship* between I&M's retail and wholesale rates, coupled with petitioners' disregard of the Federal Power Act's mandate not to engage in discriminatory pricing. *See FPC v. Conway,* 426 U.S. 271 (1976) (Pet. App. 18a-22a; 57a-58a). No state authority either ordered or possessed authority to order petitioners to align I&M's wholesale and

[11]Contrary to Petitioners' assertion (Pet. 25-26), the district court found, and the court of appeals agreed, that I&M's wholesale and retail rate alignments were motivated by a specific intent to injure competition (Pet. App. 20a-21a).

retail rates in a specified way, or to ignore the competitive implication of the relationship between wholesale and retail rates. As a result, the conflict between a clearly articulated state policy and federal antitrust policy which is a prerequisite for antitrust exemption under the state action doctrine is absent. See *Cantor v. Detroit Edison, supra,* 428 U.S. at 595-598; *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 410-413 (1978); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., supra,* 445 U.S. at 103-106.

5. A fair reading of the court of appeals' opinion refutes petitioners' attempt (Pet. 12) to characterize it as one of general applicability and importance to the electric utility industry. Neither lower court held that the filing of higher wholesale rates, while lower retail rates are likely to remain in effect, would by itself violate the Sherman Act. Rather, both courts indicated that a utility's failure to consider the competitive effects of the relationship between its wholesale and retail rates, or to justify that relationship on the basis of costs, constituted conduct which, together with other exclusionary practices, could be found to manifest a specific intent to monopolize (Pet. App. 21a, 77a). Here, the district court made findings that I&M possessed monopoly power, and engaged in a course of exclusionary conduct (of which the price squeeze was part) that manifested a specific intent to monopolize. The court of appeals affirmed those factual findings. There is no need for this Court to consider anew these factual issues. *Graver Mfg. Co. v. Linde Co.,* 336 U.S. 271, 275 (1949); see also *Berenyi v. Immigration Director,* 385 U.S. 630, 635 (1967).

Other courts surely will recognize that the court of appeals' decision rests on the facts of this particular case. Indeed, the very case which petitioners cite (Pet. Supp. Br.

1-4) to this Court as indicating a potential for conflict – *City of Groton v. Connecticut Light & Power Co.*, No. 15,609 (D. Conn. Aug 26, 1980) – distinguished this case as resting on its facts (Pet. Sup. Br. 20SA-21SA) and concluded that it did not present any conflict. There is no reason to presume that other courts will be less perceptive.[12]

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[12]The district court in this case found, and the court of appeals agreed that respondents were compelled to incur litigating costs before the Federal Commission to combat threats that petitioners would curtail their supply of wholesale power (Pet. App. 323a, 59a). Those threats were elements of a course of conduct found to have violated the Sherman Act. The costs of litigating before the Federal Commission are injuries of the type the antitrust laws were intended to prevent, since the costs were necessary to preserve respondents' competitive viability. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). As the court of appeals explained, the litigating costs were forced upon respondents by petitioners' predatory tactics and were necessarily incurred in an attempt to save the source of their electric power: "the municipalities had no choice but to file an administrative action before the Commission to prevent the loss of their wholesale power source and to establish their right to equal treatment with the utility's retail customers whom the utility had indicated would receive preferences" (Pet. App. 32a). The court of appeals thus properly held that these litigating costs were recoverable antitrust damages, in reliance on prior decisions establishing that litigation costs forced upon parties as an integral part of an antitrust violation are recoverable (*id.* at 31a). Nothing in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), suggests that litigating costs may not be treated as recoverable antitrust damages when the necessary nexus between the costs and an antitrust violation is proven. That case dealt solely with the question whether a prevailing party could be awarded attorneys' fees incurred in bringing the litigation in question, absent specific statutory allowance. It did not consider the allowance of attorneys' fees incurred in a different litigation forced upon the victim of a predatory scheme.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1980

In the Supreme Court of the United States

OCTOBER TERM, 1977

INDIANA & MICHIGAN ELECTRIC CO., PETITIONER

v.

CITY OF MISHAWAKA, INDIANA, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OCTOBER TERM, 1977

No. 77-689

INDIANA & MICHIGAN ELECTRIC CO., PETITIONER

v.

CITY OF MISHAWAKA, INDIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order of Janaury 16, 1978, inviting the Solicitor General to express the views of the United States. The views expressed herein are those of the United States and the Federal Energy Regulatory Commission, an independent regulatory commission within the Department of Energy.

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether Part II of the Federal Power Act repeals by implication Section 2 of the Sherman Act as applied to the alleged anticompetitive manipulation by a public utility of wholesale and retail rates for electric energy.

2. Whether, in an antitrust suit raising such a claim of rate manipulation, when the suit is at the pre-discovery

stage and threshold antitrust questions are unresolved, the district court, under the primary jurisdiction doctrine, must defer proceeding with the case pending the completion by the Federal Energy Regulatory Commission of its administrative proceeding involving issues concerning the reasonableness of wholesale rates in their relationship to retail rates.

STATEMENT

1. Petitioner is a public utility within the meaning of Section 201 of the Federal Power Act, as added, 49 Stat. 847, 16 U.S.C. 824. Petitioner generates, transmits, and delivers electric energy to both wholesale and retail customers in a service area comprising southwest Michigan and northern Indiana (Pet. App. 33a). Petitioner's wholesale rates are subject to the jurisdiction of the Federal Energy Regulatory Commission ("Commission")[1] pursuant to Part II of the Federal Power Act (16 U.S.C. 824-824h). Petitoner's retail rates are sub-

[1]When this complaint was filed, the Federal Power Commission had jurisdiction over interstate wholesale electric rates under Sections 205 and 206 of the Federal Power Act, as added, 49 Stat. 851, 852, 16 U.S.C. 824d and 824e. As of October 1, 1977, pursuant to the Department of Energy Organization Act ("DOE Act"), Pub. L. 95-91, 91 Stat. 565, and Executive Order No. 12009, 42 Fed. Reg. 46267, the Federal Power Commission ceased to exist, and certain of its functions and regulatory responsibilities, including "the establishment, review, and enforcement of rates and charges for the transmission or sale of electric energy * * * under part, II of the Federal Power Act, and the interconnection, under section 202(b), of such Act, of facilities for the generation, transmission, and sale of electric energy (other than emergency interconnection[s]," were transferred to the Federal Energy Regulatory Commission (DOE Act, Section 402(a)(1)(B)), an independent regulatory Commission within the Department of Energy (DOE Act, Section 402(a)). Hereinafter, "Commission" will denote the former Federal Power Commission or the Federal Energy Regulatory Commission, as the context indicates.

ject to the regulatory authorities of the States of Indiana and Michigan.

Public utilities like petitioner are required to file with the Commission "schedules showing all [wholesale] rates and * * * all contracts which in any manner affect or relate to such rates" (16 U.S.C. 824d(c)). They must give the Commission and the public 30 days notice prior to making any change in such rates or contracts (16 U.S.C. 824d(d)). The Commission may suspend any new schedule and defer the use of the rate therein for not more than five months beyond the proposed effective date, and may hold a hearing "concerning the lawfulness of such rate[s]" (16 U.S.C. 824d(e)). If the hearing has not concluded at the end of the suspension period, the proposed schedule may go into effect, and the Commission may require the utility to keep account of the amounts received by reason of the increase and to refund with interest any "portion * * * found not justified" (16 U.S.C. 824d(e)).

The Commission "upon its own motion or upon complaint," may conduct a hearing to determine whether any "rate * * * is "unjust, unreasonable, unduly discriminatory or preferential," and, if it so finds, "the Commission shall [fix] the just and reasonable rate * * * or contract to be thereafter observed and in force * * * by order" (16 U.S.C. 824e(a)). Although the Commission may disapprove a utility's rates, whether suspended or not, and prescribe the rate to be collected thereafter, the Commission has no power to order reparations with respect to past rates that had not been suspended. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254.

Petitioner is required to file its retail rates with the Public Service Commissions of Indiana and Michigan. Both States require that the retail rates be approved prior

to being placed in effect. Ind. Code Ann. §§ 8-1-2-1, 8-1-2-38, 8-1-2-42 (1973); Mich. Stat. Ann. § 22. 13(6), 6(a) (1970). Petitioner may file new retail rates at will. Ind. Code Ann. § 8-1-2-42 (1973); Mich. Stat. Ann. § 22.13(6a) (1970).

The respondents are ten municipalities which operate their own electric distribution systems, purchase electric energy at wholesale from petitioner and retail that electricity to their own customers.

2. Respondents filed this antitrust action in March 1974 against petitioner, charging that it had monopolized and attempted to monopolize the distribution and sale of electric power at retail, in violation of Section 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 2 (Pet. App. 55a-64a). Specifically, the complaint and an amended complaint filed in 1976 alleged that petitioner, the area's sole wholesaler of electric power (*id.* at 58a, ¶ 5), and supplier of retail service to 90 percent of the communities in its service area (*id.* at 58a, ¶ 6), engaged in a predatory price squeeze by filing wholesale rates in June 1972 and May 1976 that were higher than the retail rates petitioner charged large industrial users located in or near respondents' service areas[2] *(id.* at 59a, ¶ 7(a)). This practice, it is alleged, threatened to squeeze respondents out of retail competition by preventing them from reselling electric energy to their industrial customers at rates competitive with petitioner's retail industrial rates (Pet. App. 58a-59a, ¶ 7). The complaint sought monetary damages and an injunction against the charging of wholesale rates that are higher than retail rates (*id.* at 61a, ¶¶ 3, 4).

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[2]By order issued June 1, 1977, the Commission approved a settlement between petitioner and respondents with respect to petitioner's 1972 filing. However, there is some dispute whether that settlement has mooted the antitrust issues with respect to that filing (compare Pet. 7, n. 9, with Resp. Br. 5).

Prior to the filing of the complaint, the Commission, in January 1974, initiated hearings under 16 U.S.C. 824e(a) to determine the lawfulness of petitioner's 1972 wholesale rate filings and, in January 1977, initiated hearings to determine the lawfulness of the 1976 filing. Petitioner sought dismissal of the complaint for lack of jurisdiction or, alternatively, a stay of proceedings pending the conclusion of Commission proceedings on the 1972 wholesale rate filing. The district court declined to dismiss the case. It recognized that determination of the reasonableness of the wholesale and retail rates was the exclusive province of the Commission and the State Commissions, respectively (Pet. App. 45a). Nevertheless, it concluded that it had jurisdiction because the antitrust complaint challenged the relationship between, not the reasonableness of, the two categories of rates. It stated that neither regulatory agency had clear authority fully to dissipate the anticompetitive effects of the alleged price squeeze, and that there was no evidence of a congressional intent to exempt the alleged conduct from the antitrust laws (*id.* at 49a).

The court also declined to stay the antitrust litigation at the pre-discovery stage pending termination of the Commission's proceedings because the monopolization charge was based on the relationship between the two rates, not merely the rate over which the Commission had jurisdiction. The district court, however, held open the possibility of staying the antitrust case at the remedy stage and deferring to the Commission if a determination of the reasonableness of the whoelsale rate became relevant (*id.* at 53a).

3. On interlocutory appeal, the court of appeals affirmed (Pet. App. 6a-30a). It found nothing in the Federal Power Act or in any of this Court's opinions indicting that the Commission has exclusive jurisdiction over price

squeeze issues. It reasoned that although the Commission has statutory authority to adjust wholesale rates to lessen the anticompetitive effect of some price squeezes (*Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271), the Commission cannot remedy all such conduct (Pet. App. 15a-16a).

The court held that there was no reason to imply that the Commission had exclusive jurisdiction, *i.e.*, that the conduct upon which the complaint is based is exempt from the antitrust laws. The court concluded that as long as the rate structure — the relationship between the two rates — was not the result of governmental directive, but was initiated by the utility, there was no unfairness in applying the antitrust laws to the utility's conduct (Pet. App. 18a-19a). The court further ruled that the application of the antitrust laws to the particular practice charged here would not be repugnant to the regulatory scheme, because, if respondents demonstrated either attempted or actual monopolization, remedies under the antitrust laws would not disturb the regulatory rate-setting process (*id.* at 20a).

The court of appeals also concluded that approval of the retail rates by the state Commissions did not convert the utility-initiated dual-rate schedule into "state action" of the type to which the Sherman Act is inapplicable under *Parker v. Brown*, 317 U.S. 341. It is pointed out that while the federal courts may not review the reasonableness of the state-approved retail rates, neither the Michigan nor the Indiana Commission had approved the relationship between the wholesale and retail rates, which was the gravamen of the complaint (*id.* at 17a-18a). Consequently, it held that application of the antitrust laws to the utility-created relationship between the wholesale and retail rates would not create any federal-state conflicts.

The court of appeals also affirmed the district court's refusal to stay the antitrust proceedings. After reviewing the pertinent facts, the court concluded that neither the need to avoid conflicts between the court and the Commission nor the desirability of judicial access to Commision expertise gave the Commission "primary jurisdiction over the price squeeze" (*id.* at 21a) or warranted "deferral" to the agency "as a matter of judicial administration" (*id.* at 23a). The court saw no danger that the district court would make any determination of antitrust liability that would conflict with any Commission ruling on the reasonableness of the present wholesale rates (*id.* at 23a-27a). The court, however, noted the district court's obligation to stay its hand if the agency's expert views on those issues became relevant to any determination the district court would be required to make (*id.* at 30a).

DISCUSSION

1. Petitioner contends first (Pet. 10-20) that the Commission has exclusive jurisdiction to adjudicate (and remedy, if appropriate) the price squeeze allegations in the complaint because this Court, in *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271, held that the Commission, in determining whether wholesale rates subject to its jurisdiction are just and reasonable, should consider whether the relationship between the utility's wholesale rates and its retail rates is discriminatory or anticompetitive. In other words, petitioner contends, in effect, that Part II of the Federal Power Act, giving the Commission jurisdiction over wholesale rates, implicitly repealed Section 2 of the Sherman Act as applied to alleged anticompetitive manipulations by electric utilities of their wholesale and retail rates. The court of appeals correctly rejected that contention.

This Court has often held that public utilities are not exempt from the antitrust laws merely because they are regulated by state or federal agencies (see *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579; *Gulf States Utilities Co.* v. *Federal Power Commission*, 411 U.S. 747; *Otter Tail Power Co.* v. *United States*, 410 U.S. 366), and Parts II and III of the Federal Power Act contain no express exemption of electric utilities from the antitrust laws. As this Court said in *Otter Tail Power Co., supra*, 410 U.S. at 373-374: "There is nothing in the legislative history [of Part II of the Federal Power Act] which reveals a purpose to insulate electric power companies from the antitrust laws. To the contrary, the history * * * indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest."

Whether a regulatory statute implicitly exempts *particular* challenged activities in a regulated industry from the antitrust laws depends on whether an exemption of those activities is essential to make the regulatory scheme work. *See, e.g., Gordon* v. *New York Stock Exchange*, 422 U.S. 659. Each case requires an analysis of the activity in question, the degree to which it is regulated, and the regulatory purpose, but the general principle is well settled that such repeals by implication are not favored. *Gordon, supra*, 422 U.S. at 682-683 and cases there cited.

In view of the nature of the alleged price squeeze and the Commission's limited remedial powers with respect to it, there is no basis for implying an exemption from the antitrust laws. A price squeeze operates like a vise, both jaws of which may be manipulated by the utility; one jaw is the retail rate and the other is the wholesale rate. The Commission can move only the wholesale rate, and it can do so only within a limited range, by adjusting the wholesale

rates within the zone of reasonableness. See *Conway, supra*, 426 U.S. at 278.

The Commission, however, may conclude that even after setting the wholesale rate at the lower end of the zone of reasonableness, the differential between that rate and the retail rate still works an anticompetitive price squeeze. Since the Commission cannot compel a utility to file higher retail rates with the state regulatory agencies, its jurisdiction to remedy the alleged antitrust violation is incomplete.[3] As in *Otter Tail Power C o., supra*, the limited authority of the Commission over the anticompetitive practice alleged shows that that practice is not immunized from antitrust regulation, and that the jurisdiction of the antitrust court is necessary to vindicate fully the policies of both the Federal Power Act and the antitrust laws "of maintaining competition to the maximum extent possible consistent with the public interest." *Otter Tail Power Co.*,

[3]Moreover, even the Commission's authority to adjust wholesale rates in response to its determination of an anticompetitive price squeeze is inadequate to compensate the victims for the antitrust violation. Save for post-suspension refunds of unjustified increases ordered in ongoing proceedings, it has no power to remedy past unreasonable rates: *i.e.*, it cannot award retroactive reparations. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co., supra*, 341 U.S. at 254. In addition, once the suspension period has expired, the utility's wholesale customers must pay the filed rate, which is the legal rate, until the Commission finds that rate to be unlawful. *Id.* at 251-252. If antitrust remedies were unavailable, wholesale customers would have no remedy for competitive injuries suffered in the interim. Postsuspension refunds, as the Court has observed, are an imperfect compensation for unreasonable rates. See, *e.g., Federal Power Commission v. Hunt*, 376 U.S. 515, 524-525; *Federal Power Commission v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 154. They are much more inadequate to compensate for the effects of an antitrust violation, for which Congress has authorized treble damages. See *e.g., Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 488-494; *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-265.

supra, 410 U.S. at 374.[4] See also *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 460-461; *Silver* v. *New York Stock Exchange*, 373 U.S. 341.

Application of the antitrust laws to price squeeze allegations would not interfere with the regulatory functions and responsibilities of the Commission with respect to wholesale rates. Since the antitrust court may refer to the Commission issues calling for the Commission's expertise under the doctrine of primary jurisdiction (discussed, *infra*, pp. 14-24), the functions of the court and the Commission will be complementary, not contradictory. That is, the court will be available to provide a complete remedy for anticompetitive or monopolistic practices that the Commission cannot fully remedy, without interfering with the agency's authority.

The cases relied on by petitioner are not to the contrary. Nothing in *Conway*, which held that the Commission had authority to consider in its proceedings the anticompetitive

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[4]Indeed, the argument in favor of exclusive jurisdiction here is weaker than that held insufficient in *Otter Tail*. There Congress had authorized the Commission to order interconnections and had rejected a provision that would have required a utility to "wheel" energy over its lines and relied instead on voluntary utility action. The dissenters in *Otter Tail* indicated that, but for these congressional decisions, they too would have voted against exclusive agency jurisdiction. 410 U.S. at 390-391, n. 7 (Stewart, J., dissenting). Here, there is no such evidence that Congress arguably intended to insulate a utility's structuring of the relationship between its wholesale and retail rates from antitrust scrutiny. Rather, the limitations which Congress placed on the Commission's rate setting authority suggest that the Congress intended the antitrust laws to complement the authorities of the Commission and the respective state commissions, and to regulate the conduct that neither the Commission nor the state commissions may regulate.

effects of an alleged price squeeze between retail and wholesale rates, suggested that the Commission was the exclusive forum for adjudicating those issues and, consequently, that an injured party has no judicial remedy under the antitrust laws.

Gordon v. *New York Stock Exchange, supra,* and *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694, involved completely different statutory schemes. In those cases this Court implied an antitrust exemption because it found an irreconcilable conflict between the standards of the Sherman Act on the one hand and the Securities Exchange Act and the Investment Company Act on the other. The regulatory statutes contemplated and authorized, subject to Securities and Exchange Commission's revision and approval, the practices that were challenged (commission rate fixing and mutual fund distribution restrictions) and that would otherwise have been *per se* violations of the Sherman Act.

In contrast, Part II of the Federal Power Act gives no indication that Congress intended either to approve the challenged price squeezes or to subject those practices to the exclusive regulatory jurisdiction of the Commission. As this Court has observed of the Federal Power Act (*Otter Tail, supra,* 410 U.S. at 374):

> Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies emphasized in the antitrust laws.

2. Petitioner also contends (Pet. 24-28) that even if the Commission has completed its administrative proceeding issues the complaint raises, principles of primary jurisdiction require that the district court stay its hand until the Commission has complete its administrative proceeding on the lawfulness of petitioner's 1976 wholesale rates (see *supra*, p. 5). The court of appeals correctly rejected that contention.[5]

The doctrine of primary jurisdiction "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 63. In cases where a court has jurisdiction over a claim, it may nevertheless be appropriate for the court to refer specific issues to the agency in order to ensure "consistency in the regulation of business entrusted to a particular agency" and also to enlist the expert assistance of "agencies that

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[5]Petitioner also criticizes at some length (Pet. 20-23) the court of appeals' reliance on *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, apparently in support of petitioner's contention that the states' regulation of its retail rates provides antitrust immunity under *Parker* v. *Brown*, 317 U.S. 341. However, petitioner has not presented that issue for review (see Pet. 2-3). In any event, *Cantor* itself refutes any broad contention that a state agency's mere approval of rate filings immunizes the utility from antitrust liability with respect to all actions relating to that filing (see 428 U.S. at 595-598), particularly where, as here, the complaint does not concern the retail rate *per se*, but the relationship between that rate and the wholesale rate. See *City of Lafayette* v. *Louisiana Power and Light Co.*, No. 76-864, decided March 29, 1978.

We do not suggest that petitioner is completely foreclosed from raising a "state action" defense. For example, if the alleged price squeeze resulted solely from a state agency's reduction of the utility's proposed retail rates, the squeeze might be attributable to state rather than private action. Such a defense would be an evidentiary one, however, and, as petitioner recognizes (Pet. 23, n. 14), the factual allegations in the complaint must be accepted as true for purposes of the motion to dismiss.

are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Far East Conference* v. *United States*, 342 U.S. 570, 574-575. See also *Nader* v. *Allegheny Airlines*, 426 U.S. 290, 303-304. In the present case, the Commission already is conducting a proceeding to determine the lawfulness under the Federal Power Act of the price squeeze allegedly resulting from the 1976 wholesale rate. Accordingly, there would be no need for the antitrust court to refer this case to the agency to make that determination. The question, rather, is whether the district court should defer proceeding with the antitrust case to enable the Commission to exercise its primary jurisdiction over certain issues. Since we believe that the issue of referral, as it usually arises under the primary jurisdiction doctrine, and the issue of deferral under that doctrine here presented, involve primarily the same considerations, we shall discuss the question here under the traditional primary jurisdiction analysis.

Both the district court and the court of appeals recognized that at some point in this litigation it may become appropriate for the district court to defer its proceedings to enable the Commission to consider certain issues that call for the application of the agency's expertise. That possibility, however, does not mean that deferral is necessary at the present, pre-discovery stage of the litigation.

Respondents' complaint raises several factual issues that do not call for the application of the Commission's expertise and that should be considered in the first instance by the district court. These include the following: has petitioner departed from the historical relationship between its retail industrial rates and its wholesale rates in recent filing: has petitioner engaged in conduct in Fort Wayne designed to discourage continuation of the Fort Wayne municipal system (Pet. App. 59a, ¶ 7(b)); are petitioner's

present retail rates to large industrial users in fact lower than present wholesale rates;[6] were petitioner's past retail rates in fact lower than past wholesale rates; have any antitrust issues relating to the 1972 wholesale filing been settled;[7] and does the alleged price squeeze result from state commission reductions in the retail rate tariffs petitioner proposed?[8]

Initial judicial resolution of these threshold issues would establish the contours of the antitrust case. Moreover, such resolution might result in dismissal of the suit for failure to establish a *prima facie* case. Deferral is not appropriate until resolution of a material issue requires Commission expertise or the application of regulatory standards that call for uniform application. Whether such requirements exist cannot be determined in the abstract, or at the present preliminary stage of this litigation *Cf. American Tel. and Tel. Corp. v. United States, C.A.D.C.*, No. 77-2009, decided May 26, 1977, *certiorari denied* November 28, 1977, No. 77-372. Deferral to the Commission's primary jurisdiction at this point would be premature. Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp., 360 U.S. 411, 415.

Indeed, the court of appeals' statement that the district court may at some point refer to the Commission "to decide * * * antitrust damages, or for other purposes" (Pet. App. 30a), indicates sensitivity of the court below to the proper balance between electric utility regulation and antitrust law enforcement. *Otter Tail, supra,* 410 U.S. at 382.

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[6]Petitioner contends that its wholesale rates are actually lower than applicable retail rates and that consequently respondents' claim of injury is without merit (Pet. App. 37a).

[7]There is some dispute whether all such issues were settled. Compare Resp. Br. at 5 with Pet. Br. at 7 n. 9.

[8]Petitioner states that the Indiana Commission reduced its 1976 Indiana rate filing by some $34 million (Pet. 23, n. 14).

3. Although the Commission and the United States agree that it would be premature for the antitrust court now to stay this case pending the Commission's decision and that the petition for a writ of certiorari should therefore be denied, the Commission and the United States have different views with respect to the necessity of an eventual exercise of the agency's primary jurisdiction over certain issues and the consequences of the Commission's decision thereunder.

a. In the Commission's view the issues the complaint raises and the Commission's regulatory responsibilities over rates, as construed by this Court in *Conway* and other cases, indicate that at some point in this litigation the Commission's action taken in the exercise of its primary jurisdiction may become controlling. The gravamen of the complaint is the allegation that petitioner has structured its wholesale and retail rates in a way to eliminate its retail competitors (and wholesale customers) for monopolistic purposes. *Conway* establishes that the Commission must consider such an allegation in reviewing the justness and reasonableness of the wholesale rates. If, in its pending proceeding, the Commission were to conclude under *Conway* that the differential between the wholesale and retail rates is justifiable and not the product of anticompetitive manipulation, and therefore approved the wholesale rate as just and reasonable, established ratemaking principles indicate to the Commission that a court would be bound by such a determination.

The Commission believes that such a conclusion is required because decisions of this Court indicate that only the agency charged by Statute with ratemaking responsibilities has jurisdiction to determine whether rates are just and reasonable; any other conclusion would present a risk of conflicting determinations and standards concerning the reasonableness (and therefore the lawfulness) of rates that is inconsistent with basic principles of rate regulation. *United States* v. *Radio Corporation of*

America, 358 U.S. 334, 346-348; *Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; *cf. Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 453.

In the Commission's view, this Court's decision in *Conway* establishes that one of the criteria for determining the reasonableness of jurisdictional wholesale rates is the effect on competition of the relationship of that rate to the non-jurisdictional retail rate. Since the Commission's assessment of that effect is integral to its determination of the reasonableness of the wholesale rate (and *vice versa*), that assessment must, in the agency's view, be binding on the antitrust court. In sum, before the respondents can prevail on their antitrust complaint, the Commission must determine the ultimate issue of the reasonableness of the wholesale rates in relation to the retail rates.

The Commission believes that such a determination would not only prevent inconsistent decisions respecting the reasonableness of rates but also would serve the other policy of the primary jurisdiction doctrine by enlisting the expertise of the administrative agency on technical issues within its province.[9] See *United States* v. *Radio Corpora-*

[9]The Commission has promulgated procedures for the exploration of price squeeze issues. FPC Order No. 563, Docket No. RM76-29, issued March 21, 1977. They require the party alleging an anticompetitive price squeeze to set forth, at least, the following elements (18 C.F.R. 2.17):

1) Specification of the filing utility's retail rate schedules with which the intervening wholesale customer is unable to compete due to purchased power costs;
2) A showing that a competitive situation exists in that the wholesale customer competes in the same market as the filing utility;
3) A showing that the retail rates are lower than the proposed wholesale rates for comparable service;
4) The wholesale customer's prospective rate for comparable retail service, i.e., the rate necessary to recover bulk power costs (at the proposed wholesale rate) and distribution costs; [and]
5) An indication of the reduction in the wholesale rate necessary to eliminate the price squeeze alleged.

tion of America, supra, 358 U.S. at 346. The issues which the Commission would consider, as this Court indicated in *Conway, supra,* 426 U.S. at 280-282, include determinations as to "which of the [utility's] costs are allocable to its non-jurisdictional, retail sales and which to its jurisdictional, wholesale sales" (*id.* at 280-282). It must also consider "not only * * * the existence of a difference between jurisdictional and non-jurisdictional rates, but also * * * the anticompetitive impact of the particular magnitude of [the] rate differential." *Cities of Batavia* v. *Federal Power Commission,* 548 F. 2d 1056, 1057 (C.A.D.C. 1977). These questions involve expert exploration of the reasons for the differential, including the competing systems' operating costs and the engineering and generating factors bearing on those costs (*id.* at 1057-1058).[10]

In Order No. 563, *supra,* the Commission also expressly recognized "that state commission participation in rate proceedings before the Commission, particularly in cases involving retail and wholesale rate comparisons, would be desirable, and awareness of the state commission's views on price squeeze issues would be valuable" (*id.* at 5-6). Accordingly, state commissions are automatically included in the service list in *Conway* cases. 18 C.F.R. 2.17(f). The participation of the state commissions may enable the Commission to develop a more complete record. See 16 U.S.C. 824c(b), and 824h(b); 18 C.F.R. 1.37 (Cooperative procedure with state commissions).

[10]The same considerations make it appropriate for the antitrust court to refer to the Commission issues involving the reasonableness of past rates. Although the Commission has no authority to provide retroactive remedies (see *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra*), the need for uniformity in the standards governing just and reasonable rates and the assistance which the Commission's expertise can bring to bear on the technical issues involved suggest that those issues should also be referred to the Commission for its determination. *Montana-Dakota Utilities Co.* is not to the contrary. There the Court held there was no federal cause of action with respect to the plaintiff's claim that past rates were the result of the defendant's fraud, and there was therefore no basis for referring the case to the Commission. Here there is a federal cause of action with respect to the respondents' antitrust claims.

b. The United States, however, believes that while it may be appropriate for the Commission to determine certain issues, the antitrust court has the ultimate responsibility for determining the issue of the alleged anticompetitive effect of the price squeeze, and believes that the Commission's determination of that issue would not be binding on the court. Thus, the United States does not agree with the Commission to the extent that the latter reads *Conway* as making its determination of the competitive issues concerning the price squeeze binding on the antitrust court. In requiring the Commission to consider the possible anticompetitive effects of a price squeeze, this Court in *Conway, supra* 426 U.S. at 279, relied on its earlier decision in *Gulf State Utilities, supra*. There, this Court noted that Commisison consideration of competitive issues serves as the "first line of defense" against practices that might later be the subject of antitrust proceedings. 411 U.S. at 760. The Commission's reading of *Conway* would render it not the "first line of defense" against anticompetitive price squeezes, but rather the final arbiter of the competitive impact and consequent antitrust legality of the squeeze. As such, the United States believes that the Commission's view represents a misreading of *Conway* which would have the practical effect of allowing it to confer antitrust immunity, contrary to the principles articulated by this Court, as discussed in Part I, *supra*.[11]

The policy considerations underlying the primary jurisdiction doctrine do not support its application to the competitive impact of a specific pair of wholesale and retail rates. Resolution of issues of anticompetitive intent and effect relevant to a Section 2 Sherman Act complaint

[11]The United States finds it particularly difficult to accept the logic of the Commission's view as to past rates. Since the Commission has no authority to remedy past rates and no discernible present interest therein, the United States perceives no policy reason which supports making the Commission's determination of the competitive impact of a price squeeze caused by past rates binding on the antitrust courts.

involves judicial rather than agency expertise. Cf. *California* v. *Federal Power Commission*, 369 U.S. 482, 490. As long as the antitrust court limits itself to the competitive implications of the price squeeze and refrains from independent assessment of the reasonableness of the jurisdictional rates, there is no danger of an undesirable court-agency conflict arising. Accordingly, the United States believes that when an antitrust court has acquired jurisdiction over a price squeeze allegation, the court should be bound by the Commission's determination of the reasonableness of the wholesale rates only with respect to their cost and all of the other factors traditionally applied in such a rate-making determination. The Commission's determination of the reasonableness of the wholesale rates, however, should not control the issues in the antitrust case of the anticompetitive purpose and effect of the relationship between the wholesale and retail rates. Cf. *California* v. *Federal Power Commission*, *supra*.[12]

The United States also believes that it may not be necessary in all cases for the antitrust court to defer to the Commission before finally adjudicating the antitrust claim. To the extent that the reasonableness of the wholesale rates, in terms of cost and other traditionally applied factors, are relevant to the antitrust claims, in some cases the Commission's standards may be sufficiently clear and applicable to the facts that the court could apply them without requiring the Commission's expertise. *United States* v. *Western Pacific R. Co.*, *supra*, 352 U.S. at 69.[13] That is a judgment, however, that should be made

[12]The antitrust court, of course, could invite the Commission to express its views on the competitive effects of the alleged price squeeze.

[13]Cf. *Nader* v. *Allegheny Airlines*, 426 U.S. 290, 308-309 (White, J., concurring); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 221-222.

in the first instance by the district court in light of the facts and circumstances as they develop in the litigation.

CONCLUSION

The court of appeals correctly held that the Commission does not have exclusive jurisdiction over the issues the complaint raises, and that it would be premature to stay the antitrust case pending the exercise of the agency's primary jurisdiction. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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April 1978.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

TOWN OF NORWOOD,
MASSACHUSETTS,
Plaintiff,

v.

BOSTON EDISON COMPANY AND
NEW ENGLAND POWER COMPANY,
Defendants.

Civil Action
No. 74-4104-T

MEMORANDUM

In an action by a Massachusetts town owning its own electric power distribution system against Boston Edison Company (Edison) and another, charging, *inter alia,* violations of the Robinson-Patman Act,[1] 15 U.S.C. § 13(a), Edison, arguing lack of subject matter jurisdiction, moved for summary judgment on the grounds that its sales to plaintiff were not in interstate commerce and electricity was not a commodity within the purview of § 2(a) of the Clayton Act. After this motion was filed but before it was ruled on, the action against Edison was settled. I have already ruled on the basis of undisputed facts that the remaining Defendant, New England Power Company (New England), of which Plaintiff was never a customer, should be granted summary judgment on Plain-

[1]Amending, of course, § 2(a) of the Clayton Act. See 15 U.S.C. § 13(a).

tiff's Robinson-Patman claims. Nothing in this Memorandum should be taken as a modification or amendment of my earlier ruling that, Plaintiff not being New England's customer, New England is entitled to summary judgment or of my denial of Plaintiff's motion for clarification. However, New England has asked me to rule, as Edison had also asked me to rule before its departure from the case, that electricity is not a commodity within the purview of Robinson-Patman, and I now address that issue.[2]

New England's argument appears to rest entirely on the holding of *Newark* v. *Delmarva Power and Light Co.*, 467 F. Supp. 763, 772-774 (D. Del. 1979). *Newark* is the only case that has been called to my attention in which the question of whether electricity is a "commodity" for regulatory power purposes was squarely raised and considered and the holding of that case supports Defendant's position. Plaintiff also appears to recognize the indistinguishability of the case at bar from *Newark*, arguing only that *Newark* was incorrectly decided.

The court in *Newark, supra,* 773 based its decision on "the wording of the statute, its legislative history, and the regulation of the electric utility industry which existed at the time the adoption of the Robinson-Patman Act." Although Robinson-Patman indeed reaches only the sale of "commodities," electricity would seem to come well within the dictionary definition of "commodity" as "(a) anything useful or that can be turned to commercial advantage." *The American Heritage Dictionary of the English Language,* p. 268. Since it is a well-known canon

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[2]A memorandum and order on so much of New England's motions for summary judgment as is based on collateral estoppel claims will be forthcoming shortly.

of statutory construction that in the absence of ambiguity words should be given their ordinary meanings, *Perrin v. United States,* 100 S. Ct. 311, 314 (1979) and cases cited, I question whether there is any need in construing § 2(a) to look beyond the statutory language.

If there is such a need, however, the analysis in *Newark* is, I respectfully submit, unconvincing. That the statute refers to "commodities of like grade and quality" does not mean that it allows price discrimination in the sale of a commodity sold in only one grade or quality, even if as the court found or ruled (it is not clear which) electricity is such a commodity. If, indeed, the words "of like grade and quality" were not included in the statute, the courts would almost certainly have had to read them into the statute to keep it from becoming sheer nonsense. Differences in price among goods of unlike grade and quality are to be expected.

Nor does the fact that the statute preserves the right of a seller to select his own customers in "bona fide transactions" indicate that businesses like public utilities that have a lesser right or no right at all to select their own customers are not subject to the statute. Indeed, as I have ruled in a memorandum issued previously deciding the motion for summary judgment of defendant New England Power Company on plaintiff's Robinson Patman claims against New England Power, only a customer is entitled to the protection of § 2(a). Several industries and businesses may under various laws be prohibited from or restricted in selecting their own customers, but it does not follow that such businesses do not deal in "commodities" as that term is used in Robinson-Patman.

Footnotes omitted, the portion of the opinion in *Newark, supra,* 774, discussing the legislative history of the word "commodities" used in § 21(a) states:

> The section read as a whole reflects a concern about price discrimination with respect to manufactured products and consumer goods. The legislative history, reflecting the same concern, relates entirely to competitive problems then existing in the distribution of goods which conventionally were sold through a supplier-wholesaler-retailer channel that was being invaded by grocery chains and retail order houses. The House and Senate Reports, for example, refer to "goods, wares and merchandise" in discussing the scope of Section 2(a) and Representative Patman, when introducing his bill, spoke in terms of "food and merchandise distribution" and "huge chain stores."

It is hardly surprising that in 1936 Congressional reports and individual members of Congress would have thought in terms of "food and merchandise distribution" in explaining the purposes of the Robinson-Patman Act. It does not follow that they intended to exclude other items or products from its coverage. For example, if a legislature should enact a statute punishing the owners of "animals allowed to go unleashed on a public way," it would be of no help to the owner of an unleashed ocelot found on a public way that all of the legislative discussions of the bill had concerned dogs.

The position that electricity is a "commodity" within the purview of § 2(a) of the Clayton Act is also taken by Von Kalinowski, *Anti Trust Law and Trade Regulations,* § 24.05.

The *Newark* opinion, *supra,* 774, also concluded that the regulatory scheme by which Congress in 1935 established the Federal Power Commission[3] indicated an

[3]Now the Federal Energy Regulatory Commission.

intent that electric companies not be subject to Robinson-Patman, stating:

> Even more significant is the fact that the Congress which passed the Robinson-Patman Act in 1936 had a year earlier amended the Federal Power Act to provide for FPC review of all rates charged for the transmission or sale of electric power subject to its jurisdiction. The amendment, drawing from the Interstate Commerce Act, included a directive that the FPC review any disparity in rates between categories of the purchases so as to prohibit unreasonable discrimination. *St. Michaels Utilities Commission v. FPC,* 377 F.2d 912 (4th Cir. 1967). When this amendment was enacted Congress must have contemplated that the FPC and the courts would develop decisional rules for determining which differentials are discriminatory and which are not, as they have in fact done. *St. Michaels Utilities Commission v. FPC, supra.* Given the existence of this regulatory scheme in 1936 and the prevalence of state regulation of intrastate sales which Congress expressly reserved to the states in the Federal Power Act, I think it unlikely that Congress intended electric utilities rates to be subject to the Robinson-Patman Act rules governing justified or unjustified differentials or to the authority of the Federal Trade Commission "to fix and establish quantity limitations."

However persuasive this reasoning might be if there were no binding case law in point, the Supreme Court has in fact dealt with a very similar argument in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 373-375 (1973) holding:

> The District Court determined that Otter Tail's consistent refusals to wholesale or wheel power to its municipal customers constituted illegal monopolization. Otter Tail maintains here that

its refusal to deal should be immune from antitrust prosecution because the Federal Power Commission has the authority to compel pursuant to § 202(b) of the Federal Power Act. The essential thrust of § 202, however, is to encourage voluntary interconnections of power. See S. Rep. No. 621, 74th Cong., 1st Sess., 19-20, 48-49; H.R. Rep. No. 1318, 74th Cong., 1st Sess., 8. Only if a power company refuses to interconnect voluntarily may the Federal Power Commission, subject to limitations unrelated to antitrust considerations, order the interconnection. The standard which governs its decision is whether such action is "necessary or appropriate in the public interest." Although antitrust considerations may be relevant, they are not determinative.

There is nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest. As originally conceived, Part II would have included [a] "common carrier" provision making it the duty of every public utility to . . . transmit . . . ." In addition, it would have empowered the Federal Power Commission to order wheeling [if it found such action to be necessary] or desirable in the public interest." H.R. 5423, 74th Cong., 1st Sess.; S. 1725, [74th Cong., 1st Sess. These provisons] were eliminated to preserve "the voluntary action of the utilities." S. Rep. No. 621, 74th Cong., 1st Sess., 19.

It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these rela-

> tionships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws. See *United States v. Radio Corporation of America, supra,* at 351, 79 S. Ct. 457, 467. This is particularly true in this instance because Congress, in passing the Public Utility Holding Company Act, which included Part II of the Federal Power Act, was concerned with "restraint of free and independent competition" among public utility holding companies. See 15 U.S.C. § 79a(b)(2).
>
> Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for, or to immunize Otter Tail from, antitrust regulation for refusing to deal with municipal corporations.

Although *Otter Tail* was decided under the Sherman Act, not Robinson-Patman, and although Sherman Act holdings cannot blindly be applied to Robinson-Patman actions, see *Gulf Oil Corp.* v. *Copp Paving Co., Inc.,* 419 U.S. 186, 194-195 (1974), there is nothing in *Otter Tail*'s discussion of non-preemption of antitrust jurisdiction by the Federal Power Commission that would offer a meaningful distinction between that case and the case at bar.

So much of the *Newark* opinion, *supra,* as deals with regulation of electric power by the Federal Power Commission is not really germane to the question of whether electricity is a commodity; *Newark* marshalls no argument or reasoning to show that Congress intended to accord electric power different treatment (as a non-commodity) under the Robinson-Patman Act from that accorded it under the Sherman Act. Because I am persuaded that elec-

tricity is a "commodity" within the purview of § 2(a) of the Clayton Act and because I am of the opinion that the *Otter Tail* case leaves no reason for an exemption from antitrust jurisdiction based on regulation by the Federal Energy Regulatory Commission, I would not grant summary judgment as to the Robinson-Patman claims put forth by plaintiff in this action on the basis that electricity is not a commodity. On New England's claim that it is entitled to summary judgment on the basis that plaintiff was never its customer, I have already entered an order granting summary judgment to New England.

/s/

DAVID BERMAN, MASTER

Entered this 12th day of May, 1980.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TOWN OF NORWOOD,	*	
	*	
Plaintiff,	*	
	*	
V.	*	CA 74-4104-T
	*	
NEW ENGLAND POWER COMPANY	*	
	*	
	*	
Defendant.	*	

ORDER

TAURO, D.J. May 7, 1982

For the reasons stated in the Master's memoranda, the following orders of the Master are affirmed and adopted by this court:

1) Order of March 24, 1980 granting defendant New England Power Co.'s motion for summary judgment as to plaintiff's Robinson-Patmain claims for discrimination.

2) Order of November 18, 1980 advising the trial court to conduct the trial on the theory that the findings of the Federal Power Commission, that NEPOOL was not anticompetitive in purpose or effect, are entitled to collateral estoppel effect.

3) Order of January 6, 1982 limiting the introduction of evidence to controvert certain facts deemed to have been established by the Federal Energy Regulatory Commision.

It is so ORDERED.

/s/

United States District Judge